Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The question in this case involves a conflict between the highest courts of Georgia and Mississippi and was expressly reserved by this Court in *Murray v. Giarrantano*, 492 U.S. 1 (1989) and *Coleman v. Thompson*, 501 U.S. 722 (1991):

> Whether the Constitution permits the State to force a borderline mentally retarded death-row inmate who is without counsel to represent himself in state habeas trial court proceedings when those proceedings are his only opportunity to prove fundamental constitutional claims.

PARTIES TO PROCEEDING

The caption of the case contains the names of all parties to this action.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Exzavious Lee Gibson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The opinion of the Georgia Supreme Court denying Petitioner's Motion for Reconsideration (Appendix filed concurrently herewith ("App.") at A71) is not reported. The opinion of the Georgia Supreme Court (App. at A1) is reported at 270 Ga. 855, 513 S.E.2d 186 (1999). The opinion of the Superior Court of Butts County, Georgia (App. at 31) is not reported.

JURISDICTION

The opinion of the Georgia Supreme Court denying Petitioner's Application for Certificate of Probable Cause to Appeal was entered on February 22, 1999 (App. at 71). The opinion of the Georgia Supreme Court denying Petitioner's Motion for Reconsideration was entered on April 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §

1257, Petitioner having asserted below and herein a deprivation of his rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No . . . State [may] deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of 28 U.S.C. §§ 2244 and 2254, which reflect amendments contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") are set forth in the Appendix (App. at A72, A76). The text of Georgia Uniform Superior Court Rule 44 is set forth in the Appendix (App. at A79).

STATEMENT OF THE CASE

Exzavious Lee Gibson is the first death-row inmate in the modern era of the death penalty to be forced to proceed without counsel at his habeas evidentiary hearing. Mr. Gibson, who is borderline mentally retarded and repeatedly begged the habeas trial court to appoint counsel, was forced to fend for himself at an unfair and one-sided proceeding to determine whether the lawyer who had represented him at trial and on appeal provided effective assistance. State

habeas was Mr. Gibson's only opportunity to prove violation of fundamental constitutional rights, such as the right to effective assistance of counsel. After considering this case for almost two years, a closely-divided Georgia Supreme Court, in direct conflict with the Mississippi Supreme Court, refused to find a right to counsel in these circumstances.

Mr. Gibson now asks the Court to recognize that states owe some minimal process to indigent capital habeas petitioners when they properly seek to raise constitutional claims for the first time. Fundamental rights such as effective assistance of counsel are rendered meaningless without a remedy. This case presents an opportunity for the Court to rule on a question it has expressly left open, to address important due process, equal protection, and federalism issues badly in need of its authoritative voice, and to resolve a conflict among lower courts.

I. THE STATE HABEAS TRIAL COURT

On December 20, 1995, Mr. Gibson, who has an I.Q. of between 76 and 82 (App. at A21), filed *pro se* a "skeletal" petition for the writ of habeas corpus in the Superior Court of Butts County, Georgia.[1] (R2-I). This petition was a generic, form pleading and did not contain any particularized allegations relating to Mr. Gibson's claims. It was identical to form petitions that had been filed by ten other death-row inmates and simply raised issues that are routinely litigated in state habeas proceedings. No attorney ever investigated

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[1] The direct review of this case is not necessary to understand the issues presented in this Petition, and can be briefly summarized. Mr. Gibson was convicted by a jury of murder and armed robbery and was sentenced to death on the murder conviction and to life imprisonment for the armed robbery. The Georgia Supreme Court affirmed the conviction and death sentence, *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991), and certiorari was denied by this Court. *Gibson v. Georgia*, 502 U.S. 1101 (1992). The same attorney represented Mr. Gibson at trial and on appeal.

Mr. Gibson's case or formulated issues for meaningful review.

At about the time Mr. Gibson filed his petition, Georgia enacted new expedited procedures for capital habeas cases.[2] Because these new rules did not take effect until January 1, 1996,[3] Mr. Gibson's petition should not have been subject to the new expedited procedures, and he should have had sufficient time to locate volunteer counsel.

Although Mr. Gibson's petition was filed before the effective date, the Superior Court held that the new expedited rules applied and placed Mr. Gibson's habeas petition on a fast track. (R9, R19, R27). In response to the State's motion to set a scheduling order -- which was filed only after the State learned that Mr. Gibson did not have an attorney -- the Superior Court scheduled an evidentiary hearing, leaving Mr. Gibson only four days to file pretrial motions and approximately one month to amend his petition. (R16).

On September 12, 1996, Mr. Gibson's case was pushed to an evidentiary hearing before volunteer counsel could be found to represent him. At the hearing, Ms. Elizabeth Wells, a staff attorney with the Georgia Appellate and Educational Resource Center (the "Resource Center"),[4] appeared as amicus curiae (behind the bar) and pleaded with the court to grant a short continuance until volunteer counsel could be secured. (App. at A95-A104). The court refused to entertain argument regarding a continuance despite Mr. Gibson's obvious need, and proceeded with one of the most unfair and one-sided evidentiary hearings imaginable:

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2 Georgia Uniform Superior Court Rule 44 (App. at A79).

3 Ga. Code. Ann. § 9-14-47.1.

4 The Resource Center is a not-for-profit organization that tracks and monitors capital litigation in Georgia. (App. at A2 n. 1).

The Court: Okay. Mr. Gibson, do you want to proceed?

Mr. Gibson: I don't have an attorney.

The Court: I understand that.

Mr. Gibson: I'm not waiving any rights.

The Court: I understand that. Do you have any evidence you want to put up?

Mr. Gibson: I don't know what to plead.

The Court: Huh?

Mr. Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything, I'm just asking you if you have anything you want to introduce to this Court.

Mr. Gibson: But, I don't have an attorney.

The Court: Yes, sir. Do you have anything you want to tell this Court?

Ms. Wells: Your Honor.

Mr. Gibson: I don't waive my rights.

The Court: Yes ma'am.

Ms. Wells: My name is Elizabeth Wells. I have filed a number of motions in this Court as Amicus Curiae. If I could be heard for a moment.

The Court: No, ma'am, have a seat. Mr. Gibson, do you have anything you want to tell this Court?

Mr. Gibson: I don't waive any rights. . . .

The Court: . . . Mr. Gibson, I will be glad to listen to anything you want to tell me, anything you want to say. I judge you have nothing you want to say or nothing you want to tell me. Is that correct? Except what is in your petition.

Mr. Gibson: I don't have an attorney.

(App. at A94-A95). The court then deemed Mr. Gibson's case in chief to be closed and turned to the State for its presentation. (App. at A95, 105). The State conducted its examination of Mr. Gibson's trial counsel. Of course, Mr. Gibson was unaware of when or how to object. Finally, when the State began a line of questioning regarding whether Mr. Gibson had said anything to his attorney that would incriminate him in the crimes for which he was convicted, the court asked Mr. Gibson: "[D]o you have any objection to Mr. Mullis testifying to what you told him?" "Your Honor," replied Mr. Gibson, "I don't know what to do, I don't have an attorney." (App. at A114). And the court allowed the improper questioning to proceed. (App. at A115).

The examination continued, predictably without any objection from Mr. Gibson. Some time later, the Court finally asked Mr. Gibson whether he had any objection to a document proffered by the State, and the resulting colloquy was typical of virtually every exchange in the proceedings:

> The Court: Okay. Any objection, Mr. Gibson?
>
> Mr. Gibson: Your Honor, I don't waive any rights, but I don't have counsel, so I don't know what to say about anything you have asked me or anything you will ask me.
>
> The Court: Okay. Okay. They're admitted.

(App. at A142-A143). When direct examination of Mr. Mullis finally concluded, Mr. Gibson's "chance" to cross examine him arose:

> The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?
>
> Mr. Gibson: I don't have any counsel.
>
> The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?
>
> Mr. Gibson: I'm not my own counsel.
>
> The Court: I'm sorry, sir, I didn't understand you.

Mr. Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, yourself, individually, want to ask him anything?

Mr. Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.

Mr. Mullis: Thank you.

[State's Attorney]: Your Honor, I would like to at this time inquire of Mr. Gibson the circumstances of filing his petition.

Ms. Wells [from behind the bar]: Your Honor, this is improper, [State's Attorney] can't ask --

(App. at A144-A145). And with that, the court had Ms. Wells physically removed from the courtroom by a Sheriff. (App. at A146).

After the State's Attorney completed her improper questioning of Mr. Gibson, the hearing concluded. Mr. Gibson tendered no evidence, examined no witnesses, and made no objections. Indeed, he was not even provided with a pen until it was brought to the court's attention that he did not have one. (App. at A104-A105).

Approximately five months later, the court signed an order that had been drafted by the State and submitted *ex parte*. (App. at A31). The order rejected Mr. Gibson's claims, including *inter alia* his substantial ineffective assistance of counsel claims. With respect to Mr. Gibson's request for the assistance of an attorney, the Superior Court held that there is no right to counsel in state habeas under the United States Constitution. (App. at A35-A38).

In addition, the court found: "It is clear to this court, given Petitioner's demeanor and his statements at the evidentiary hearing, that Petitioner made a conscious choice not to proceed with his case at the evidentiary hearing." (App. at A35). This purported finding is followed by several

citations to the transcript where Mr. Gibson pleaded for an attorney.

Mr. Gibson's statements reflect a person with an I.Q. of 76 who is bewildered and confused by what was taking place. The conclusion that they reflect a "conscious choice not to proceed" is simply the type of one-sided outcome that can be expected when habeas petitioners are forced to fend for themselves at evidentiary hearings.

II. THE GEORGIA SUPREME COURT

After the habeas trial court issued its opinion, the undersigned counsel learned of the case and agreed to represent Mr. Gibson *pro bono* on an application for discretionary review by the Georgia Supreme Court. Counsel for Mr. Gibson filed plenary briefs arguing that Mr. Gibson was entitled to an attorney in the state habeas trial court proceedings. These briefs were based on the United States Constitution, the Georgia Constitution, and state common law. The State filed a brief in response.

After nearly two years of review, a narrow majority of the Georgia Supreme Court rejected Mr. Gibson's claims.[5] (App. at A1). The four-member majority denied Mr. Gibson's due process and equal protection right to counsel arguments on the grounds that "there is no state or federal constitutional right to an appointed lawyer upon habeas corpus . . . ." (App. at A1). Three members of the Court dissented on the grounds that "both the state and federal constitutions require appointment of counsel for a death penalty inmate who is pursuing his first habeas corpus petition and who is seeking to challenge his conviction and sentence on a basis not available on direct appeal." (App. at A20). In short, the Georgia Supreme Court expressly ruled

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[5] Although the Supreme Court declined to grant oral argument for, and formal review of, this case, the issues were fully addressed in the substantial briefs submitted by the parties, and the court expressly reached the merits of the federal constitutional issues. *Gibson v. Turpin*, App. at A1, A3-A12; *see also id.* at A20, n. 1 (Fletcher, P.J., dissenting).

on a federal constitutional issue that is reviewable by this Court.

The dissenters further concluded, in language echoing widespread criticism of the majority's result by several other courts and commentators:

> [F]undamental fairness demands that a condemned prisoner have the benefit of competent counsel to articulate his constitutional claims and to navigate the procedural and substantive morass that is our habeas corpus law. If this were not so, all states but one that impose the death penalty would not require counsel in these cases. Nevertheless, the majority today joins that one state and requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he can not possibly understand in a court of law that (most likely) will not be able to understand his constitutional concerns. This is an outcome that no just government should countenance.

(App. at A30). On April 9, 1999, the Georgia Supreme Court denied Mr. Gibson's Motion for Reconsideration. (App. at A71).

SUMMARY OF REASONS FOR GRANTING THE PETITION

This case squarely presents a question expressly reserved by the Court in its two most recent decisions on the right to habeas counsel and that has created a conflict between the Supreme Courts of Georgia and Mississippi: Whether the Constitution permits a state to force an indigent capital petitioner who is without counsel to represent himself in state habeas proceedings when those proceedings are the petitioner's first and perhaps only opportunity to raise fundamental constitutional claims.

Mr. Gibson is the first person in the modern era of the death penalty to be forced to proceed through state habeas, including an evidentiary hearing, without any assistance of counsel. This case is particularly important because the state

habeas trial court was Mr. Gibson's first and perhaps only opportunity to raise important issues, such as his fundamental constitutional right to effective assistance of counsel, suppression of exculpatory evidence, and other issues that cannot be presented at trial or on direct appeal.

The constitutional right to effective assistance of counsel at a criminal trial and first appeal is well established and particularly important because it safeguards the integrity of the criminal justice system. This Court's cases establish that criminal defendants must have an opportunity to present their claims fairly within the adversary system, which in the case of a mentally-limited person like Mr. Gibson means that they must have had the assistance of an attorney in presenting their claims once. Ineffective assistance claims cannot be raised on direct review in Georgia, and must be raised for the first time in state habeas. The right to effective assistance demands a meaningful opportunity to present ineffective assistance of counsel claims. What process the State must provide to ensure this meaningful opportunity is the very question left open by the Court.

This question must be addressed because a petitioner who is without counsel and is nonetheless forced to proceed in state habeas loses the opportunity to present constitutional claims thereafter. The rules of exhaustion and procedural default preclude a petitioner from raising in federal habeas claims that have not been preserved. Further, the newly-amended federal habeas statute places virtually exclusive reliance on the state habeas evidentiary hearing -- no new hearing will be granted in federal court in most circumstances. Accordingly, without counsel to develop facts supporting, for example, an ineffective assistance claim, petitioners such as Mr. Gibson lose forever the ability to present this fundamental constitutional right fairly within the adversary system.

This Court has afforded states broad discretion in administering their capital punishment systems and has emphasized the importance of the states' role in resolving

constitutional challenges to death sentences. However, with this deference comes obligations. If Georgia is to impose the death penalty, then it must implement procedures to protect the integrity of its system by ensuring that death-row inmates have an opportunity to, *inter alia*, test the constitutionality of trial counsel's performance. Even if Georgia is not required to provide counsel to capital habeas petitioners, this Court should decide whether it has an obligation not to expedite cases where good-faith efforts to secure counsel are underway.

The outcome of this case, and those that are accumulating in its wake, is shocking and raises substantial due process, equal protection, and federalism concerns. Litigants and the public cannot be expected to have confidence in the type of hearing conducted below. The public interest will be well served by the Court granting certiorari to resolve the question it has expressly reserved.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT

A. The Court Has Expressly Reserved Ruling On This Issue

In *Murray v. Giarrantano*, 492 U.S. 1 (1989) and *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court expressly reserved the issue presented by this case: whether there are certain circumstances in which a state must provide counsel, or other assistance, to a death-row inmate who is incapable of representing himself in state post-conviction proceedings that offer his only opportunity to present certain claims.

Giarrantano considered whether Virginia's scheme for the provision of counsel in its post-conviction process violated the right to meaningful access set forth in *Bounds v. Smith*, 430 U.S. 817 (1977). Virginia death row inmates had brought a § 1983 action to compel Virginia to provide them

with counsel in their collateral proceedings. At that time, Virginia did, in fact, provide some assistance of counsel to inmates. "Unit attorneys" had been appointed by Virginia to the prisons to assist inmates. Moreover, Virginia law authorized courts to appoint counsel, and the Court noted that such appointments had been made upon request before the filing of any habeas petition. *Giarrantano*, 492 U.S. at 10 n. 5. A splintered Court held that Virginia's scheme for appointment of counsel did not violate *Bounds*. A four justice plurality would have held that there is no right to counsel in a state habeas hearing. *Id.* at 12.

The deciding fifth vote was cast by Justice Kennedy, who expressly left open the very issue now before the Court:

> While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, *no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.* I am not prepared to say that this scheme violates the constitution.

Id. at 14-15 (emphasis added). As Justice Kennedy supplied the fifth vote in *Giarrantano*, and concurred on grounds narrower than those put forth by the plurality, his position is controlling. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (Rehnquist, C. J.); *see also Marks v. United States*, 430 U.S. 188, 193 (1977).

Unlike the petitioners in *Giarrantano*, Mr. Gibson was unable to obtain counsel to represent him and was forced to fend for himself at a habeas evidentiary hearing. Further, Mr. Gibson is borderline mentally retarded and, unlike Virginia, Georgia's prison system is not staffed with

institutional lawyers to assist in preparing petitions for post-conviction relief.

In *Coleman*, the Court examined whether errors committed by Coleman's counsel on appeal from the state habeas trial court constituted sufficient "cause" to excuse a procedural default that had occurred on appeal. Finding no right to effective *appellate* counsel on habeas appeal, the Court concluded that "cause" had not been established. *Coleman*, 501 U.S. at 756. However, the Court expressly left open the question presented by this case:

> *Finley* and *Giarrantano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, *there must be an exception to the rule of Finley and Giarrantano in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court.* The effectiveness of Coleman's counsel before that Court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Id. at 755 (emphasis added).

This case presents precisely the circumstances reserved in *Coleman*. Georgia's collateral review is the first place Mr. Gibson could present certain challenges to the constitutionality of his conviction and sentence. He did not have counsel in the habeas trial court to raise claims and present evidence necessary to vindicate important constitutional rights that had never been heard by any court.

Accordingly, in both *Giarrantano* and *Coleman*, the most recent decisions on this issue, the Court recognized the difficulty of denying counsel at the first opportunity to present ineffective assistance claims, and expressly left the question open for another day.

Earlier decisions also leave this question open, and foreshadow the difficulty of Mr. Gibson's case. In holding that defendants have a right to counsel on appeal, the Court in *Douglas v. California*, 372 U.S. 353 (1963), anticipated the problem of not having a lawyer at the first opportunity to present a claim:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.

Id. at 356. Similarly, in holding that the right to counsel did not extend to discretionary appeals, the Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), expressly contemplated that all claims would have already been presented at least once by a lawyer:

> At that stage he will have, at the very least, a transcript or other record of trial court proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. . . . *Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision . . . should be able to ascertain whether his case satisfies the standards established by the legislature for such review.*

Id. at 615 (emphasis added).

Finally, in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court determined that the requirements appointed counsel must follow when withdrawing from a case[6] did not apply to withdrawal of counsel appointed in the state habeas trial court. *Finley*, 481 U.S. at 555. The petitioner in *Finley*, after completing the direct review process, had filed a petition for state post-conviction relief in which she raised the same issues that the Pennsylvania Supreme Court had already rejected on direct review.[7] The Court was not confronted with a petitioner's attempt to raise issues that could only be raised for the first time in the state habeas trial court.

Accordingly, *Finley* involved neither the core right to counsel nor a petitioner's first opportunity to raise ineffective assistance claims. Importantly, the Court in *Coleman*, recognized that *Finley* did not resolve the issue of whether a right to counsel exists "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755.

This case squarely presents that issue. Mr. Gibson is the first person in any state in the modern era of the death penalty to be forced to represent himself in state habeas trial court proceedings. Petitioners in numerous cases have initiated actions seeking the appointment or payment of counsel, or challenging the effectiveness of habeas counsel. The common denominator in these case, however, is that some form of counsel was provided. In each of these cases, counsel was either mandated by rule, available as a matter of fact, or the case was stayed until counsel could be secured.

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[6] *See Anders v. California*, 386 U.S. 738 (1987).

[7] Pennsylvania was one of the few states to permit litigants to raise post-conviction claims that had already been reviewed once.

B. Fundamental Constitutional Rights Are At Stake

1. *Indigent Defendants Are Entitled To An Opportunity To Present Their Claims Fairly Within The Adversary System*

The Court has long recognized that a criminal defendant is entitled to an attorney to present claims of constitutional error. "[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quotation omitted); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Nearly all constitutional claims must be raised at trial or on appeal, where attorneys are required. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Douglas v. California*, 372 U.S. 353, 356-57 (1963). Defendants are not, by contrast, entitled to an attorney on discretionary appeals because they already would have had the benefit of an attorney's assistance in presenting their claims. *Ross v. Moffitt*, 417 U.S. 600 (1974).

State habeas is the first opportunity to raise several fundamental constitutional claims such as ineffective assistance of counsel, failure to produce exculpatory evidence, jury misconduct, and knowing use of perjured testimony. To deny any assistance by an attorney in presenting these claims is to deny a criminal defendant an adequate opportunity to vindicate fundamental constitutional rights.

2. *State Habeas Was Mr. Gibson's First Opportunity To Present His Fundamental Right To Effective Assistance Of Counsel*

Mr. Gibson's skeletal petition raised for the first time a claim for ineffective assistance of his trial counsel. The constitutional right to effective assistance of counsel at trial and first appellate review is well-established. *E.g., Strickland*

v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.") (quotations omitted); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The right to effective assistance of trial counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment because it protects the fundamental right to a fair trial. *Strickland*, 466 U.S. at 684-85. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

State collateral review is an essential part of the review process. In most states, including Georgia, ineffective assistance of counsel claims cannot be raised on direct appeal unless there has been a change of counsel from the trial court. *E.g.*, *Castell v. Kemp*, 254 Ga. 556, 558, 331 S.E.2d 528, 530 (1985).

State habeas is, therefore, the first opportunity to raise ineffective assistance claims. This makes practical sense because facts necessary to prove ineffective assistance claims typically do not exist in the trial record and an evidentiary hearing is necessary to establish a factual predicate for such claims. As this Court has recognized:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. . . . Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to . . . hold that criminal defendants may not raise [certain] ineffective-assistance claims . . ., we would deny most defendants whose trial attorneys

> performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel.

Kimmelman v. Morrison, 477 U.S. 365, 378 (1986). "As this Court has constantly emphasized, habeas corpus . . . actions are of fundamental importance in our constitutional scheme because they directly protect our must valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977).

C. The Decision Below Signals The Elimination Of Fundamental Constitutional Rights For Indigent Capital Petitioners Who Cannot Secure Volunteer Counsel

The issues in this case are particularly important because the Georgia Supreme Court's decision eliminates for indigent death-sentenced persons who do not have counsel not only the *first* opportunity to raise certain constitutional claims, but also *any other* opportunity to raise these claims. By denying a petitioner an attorney -- or a reasonable continuance to secure volunteer counsel -- for state habeas when that proceeding is the first opportunity to raise fundamental claims, the State is virtually guaranteeing that these claims will never be heard.

1. *Without A Lawyer, A Death Row Inmate Is Incapable Of Raising Claims Or Proffering Evidence In Support Of Those Claims*

Without a lawyer, a capital habeas petitioner is virtually guaranteed to fail to raise fundamental constitutional claims such as ineffective assistance of counsel and, even if raised, to develop facts supporting those claims. As discussed *supra*, this Court's precedent properly recognizes that a constitutional right is meaningless without a lawyer to vindicate those rights.

The recognition that lawyers are necessary to vindicate constitutional rights applies with special force in post-conviction capital cases. It is axiomatic that death-row inmates -- especially those who are borderline mentally

retarded -- are totally incapable of representing themselves in the state habeas trial court. Capital post-conviction representation is one of the most complex areas in the law: "The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994); *see also Murray v. Giarrantano*, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting) ("[T]his Court's death penalty jurisprudence is unquestionably difficult even for a trained lawyer to master."). As put by Judge Godbold, former Chief Judge of the Eleventh Circuit, "[T]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."[8]

The resources necessary to present a capital habeas case render it physically impossible for death row inmates to represent themselves, even if intellectually and emotionally capable. Lawyers devote on average 600 to 900 hours on habeas trial court proceedings,[9] and nearly all of this time is spent on activities beyond the reach of death row inmates in Georgia. Death-row inmates are allowed out of their cells only on weekdays and only for three hours per day. During this time, they do not have access to a law library -- if an inmate wants to perform legal research, he must request a particular case and that case will be brought to him.

Further, investigation and preparation of a case for habeas typically goes well beyond legal research and record evidence. A minimally-competent investigation for purposes

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[8] "You Don't Have To Be A Bleeding Heart," dialog between Judge Abner Mikva and Judge John C. Godbold, 14 Human Rights 22, 24 (Winter 1987).

[9] The Spangenberg Group, "Time and Expense Analysis in Post-Conviction Death Penalty Cases" (February 1989), at 15; The Spangenberg Group, "Study of Capital Cases in Virginia" (November 1988) at 19; The Spangenberg Group, "Time and Expense in Post-Conviction Death Penalty Cases in North Carolina" (June 1988).

of collateral review must identify evidence that would have supported claims not raised in the trial court or on direct review. This might include evidence that would have supported pretrial motions, evidence that shows other motions not pursued have merit, evidence that could impeach or discredit the State's case or support a defense, and evidence that should have been presented at the sentencing phase and that would have removed the case from death eligibility or made strong mitigating evidence. Death-row inmates have virtually no access to a telephone -- an indispensable tool in investigating evidence outside the record. They are only permitted to use the telephone to call people on their visitation list -- i.e., people who have agreed to take calls from the prisoner.

Moreover, when evidence in the hands of the police or prosecution cannot be secured through telephone calls or other investigation, litigation under the Open Records Act must be pursued. The only way to obtain documents under the Open Records Act is to physically go to the office where they are stored or pay for reasonable copying expenses. These options are unavailable to indigent prisoners because there is no excusal of fees for indigents and they obviously cannot leave death row and go to the appropriate office. *See McBride v. Wetherington*, 199 Ga. App. 7, 8 (1991).

In sum, it is beyond serious dispute that death row inmates cannot represent themselves in state habeas, and those who do are virtually guaranteed to omit important claims or evidence.

2. *Failure To Raise Claims Or Proffer Evidence Results In Waiver*

Under well-established habeas rules, a petitioner who fails to raise claims properly in state habeas will lose the ability to present those claims during federal habeas review. If a claim is not raised in the state habeas trial court, appellate courts properly could determine that it was procedurally defaulted, and the federal habeas court would be precluded from considering that issue. *E.g.*, *Coleman v.*

Thomson 501 U.S. 722 (1991); *O'Sullivan v. Boerckel*, 67 U.S.L.W. 4389 (June 7, 1999). If the procedural default is not caught by the appellate court, the federal district court properly could refuse to entertain it on the grounds that state remedies had not been exhausted. *E.g.*, *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam).

Since the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[10] federal courts are more limited in their ability to correct problems or constitutional deficiencies in the state process. The AEDPA increases the reliance federal courts must place on state habeas proceedings. The AEDPA continues to apply a presumption of correctness to the state habeas court's determination of a factual issue. 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting this presumption by clear and convincing evidence. *Id.*

Moreover, the AEDPA severely restricts the circumstances in which a federal court can hold an evidentiary hearing to develop facts necessary to meet this heightened standard of pleading. The AEDPA places nearly exclusive reliance on the state court's evidentiary hearing. Even if the state habeas evidentiary hearing is constitutionally defective, the AEDPA on its face precludes a federal evidentiary hearing unless the petitioner will present new facts that could not have been discovered at the time of the state habeas hearing and demonstrates that these facts establish actual innocence. 28 U.S.C. § 2254(e)(2).

The potential effect of these procedures is catastrophic where, as here, a petitioner does not have an attorney to develop a full and fair record in the state habeas evidentiary hearing. *Pro se* petitioners who lack legal training, have no financial resources, and are confined to death row are abjectly incapable of investigating and presenting claims.

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[10] 28 U.S.C. §§ 2244, 2254.

Yet the AEDPA asks only whether such claims *could have been discovered* through a reasonably diligent effort. Thus, meritorious claims that existed at the time of the state habeas hearing (and no doubt would have been discovered through an attorney's reasonably diligent efforts) may be lost forever.

It is a cruel fiction habeas petitioners can represent themselves. This fiction becomes shocking and unjust when the failure to raise claims precludes a petitioner from ever having the opportunity to vindicate a fundamental constitutional right. It becomes macabre when one considers that habeas relief was granted in nearly half of all capital cases between 1976 and 1991 because of constitutional error at trial.[11]

These issues are of extraordinary importance to the administration of justice and the integrity of the courts, which is why the Court has reserved the question presented. The outcome of this case is shocking and raises substantial due process, equal protection, and federalism concerns. The public interest will be well served by the Court granting certiorari.

II. LOWER COURTS ARE IN CONFLICT

State and federal courts have struggled with the issues presented in this Petition and have reached conflicting results. Although no court outside of this case has ever been faced with a petitioner who was forced to proceed through state habeas corpus proceedings without counsel, courts have confronted cases in which actual or potential habeas petitioners claimed that they were entitled to the appointment of counsel.

The Mississippi Supreme Court recently decided a case in direct conflict with the Georgia Supreme Court's decision below. In *Jackson v. Mississippi*, ____ So.2d ____, 1999

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[11] *McFarland v. Scott*, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting); *Gibson v. Turpin*, 270 Ga. 855, 513 S.E.2d 186 (1999) (Fletcher, P.J., dissenting).(App. at A23).

WL 33904 (1999) (App. at A82), the Mississippi Supreme Court held that state habeas petitioners have a right, under the United States Constitution, to an attorney in state habeas trial court proceedings. App. at A82, A87-88.

The court in *Jackson* based its conclusion on the constitutional right to equal access to justice enunciated in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ("[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'"). The court concluded: "Access to equal justice is an even greater interest where the State seeks to impose the penalty of death." *Jackson*, App. at A87. The Mississippi Supreme Court also found support in Justice Kennedy's *Giarrantano* concurrence. *Id.*

In concluding that the Constitution requires appointment of counsel in capital post-conviction proceedings, the Mississippi Supreme Court authoritatively dispelled the myth of self-representation:

> Over the years, it has become apparent that the system is flawed. Valuable time and resources are being wasted in finding representation for death-row inmates seeking post-conviction relief, especially since all remedies available under [state habeas] must be exhausted before federal habeas relief may be sought. We find at this time that recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose, requires . . . that counsel be appointed, and that reasonable expenses of litigation be allowed.

Id. at A82.

The Mississippi Attorney General did not seek review of the Mississippi Supreme Court's decision by this Court. Accordingly, the Court has not had an opportunity to address the split of authority caused by the Mississippi Supreme

Court's decision. This case provides a perfect vehicle to resolve this conflict.

Other courts have struggled with this issue, although the decisions of these courts were later reversed for a variety of reasons. For example, in *MacKall v. Murray*, the Fourth Circuit relied on the exception to *Finley* and *Giarrantano* suggested in *Coleman* to hold that state habeas petitioners have a constitutional right to effective assistance of counsel in state habeas trial court proceedings. 109 F.3d 957 (4th Cir. 1997), *vacated*, 131 F.3d 442 (4th Cir. 1997) (en banc). The court concluded:

> To decide that a defendant claiming ineffective trial counsel is not entitled to representation in his first habeas corpus proceeding, in a state that does not allow trial counsel's effectiveness to be challenged on direct appeal, would be to conclude that the defendant is not entitled in any forum to an attorney's assistance in presenting a fundamental constitutional claim. We will not so hold.

Id. at 962-963. Although the Fourth Circuit sitting en banc vacated the panel's opinion and reached a different conclusion, the panel's opinion underscores the struggle courts face in this unresolved area of the law.

III. IT IS IMPERATIVE THAT THE COURT CLARIFY THE STATE'S OBLIGATIONS TO THE POST-CONVICTION REVIEW PROCESS

This Court's cases on exhaustion and procedural default consistently emphasize the importance of state judgments in the post-conviction review of capital cases. *See, e.g.*, *Coleman*, 501 U.S. at 726, 729-31. The recent amendments to the habeas statute in the AEDPA reflect this shift toward increased reliance on the accuracy, validity, and finality of state post-conviction review. Similarly, Justice Kennedy observed in *Giarrantano* that this Court has given the states

"wide discretion" in deciding how to provide access to the courts for the poor. 492 U.S. at 14 (Kennedy, J., concurring).

With this increased deference and discretion comes important responsibilities. As recognized by the Mississippi Supreme Court in *Jackson*, states have an obligation to ensure that their judgments are worthy of the reliance placed on them by federal courts. And this, in turn, requires that the Court establish certain minimal standards of due process and equal protection necessary to warrant that reliance.

If Georgia is to impose the death penalty, then it must implement procedures to protect the integrity of its system by ensuring that death-row inmates have an opportunity to vindicate fundamental constitutional rights. States cannot, for example, postpone the appeal of important trial rights -- such as the right against self incrimination -- until habeas review, and then refuse to provide attorneys to vindicate those rights. Similarly, Georgia must provide death-row inmates with an opportunity to test the constitutionality of trial counsel's performance. Even if Georgia is not required to provide attorneys to capital habeas petitioners, it certainly cannot expedite capital cases where good-faith efforts to locate counsel are underway and thereby ensure that important constitutional claims will be forfeited.

To this end, the Court has a number of alternative remedies it can apply to this case. Each of these remedies ensures that mentally-limited death row inmates who do not have counsel to present fundamental constitutional claims will not be forced to forfeit those claims forever. At the one end of the spectrum of remedies, the Court could recognize that due process and equal protection mandate the appointment of counsel in capital habeas cases. Alternatively, the Court could conclude that if states chose not to provide counsel, due process and equal protection preclude them from expediting cases when good-faith efforts to secure volunteer counsel are underway. Finally, the Court could elect a narrow remedy by leaving the decision of whether due process and equal protection call for the

appointment of counsel to be answered in the first instance by the trial court on a case-by-case basis, subject of course to appellate review.

A. Due Process and Equal Protection Mandate The Appointment of Counsel

First, the Court could recognize that due process and equal protection mandate the appointment of counsel in capital habeas cases. Cases analyzing the right to counsel in various proceedings are tied to two, often interrelated, constitutional moorings: due process and equal protection.

Cases tied to the Due Process clause examine whether "fundamental fairness" requires the appointment of counsel. *E.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals are treated." *Ross .v Moffitt*, 417 U.S. 600, 609 (1974). "[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." *Finley*, 481 U.S. at 556; *see also Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981) ("[D]ue process is not a technical conception with a fixed content unrelated to time, place, and circumstances.") (quotation omitted).

Other lines of cases establish similar standards under the Equal Protection clause. While the focus of due process is the fairness between the State and the individual, equal protection "emphasizes the disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross*, 417 U.S. at 609. The equal protection analysis focuses more directly on whether the indigent defendant has had an appropriate opportunity to raise claims: "[W]here the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas*, 372 U.S. at 357.

The due process and equal protection cases with respect to the right to counsel eventually merge in substance. One clear principle emerges from both lines of cases: indigents must have an adequate opportunity to present their claims fairly within the adversary system. *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). The inquiry in these cases is whether the indigent defendant has been provided the basic tools for an adequate presentation of the evidence. *See Ake*, 470 U.S. at 77.

In this case, Mr. Gibson was denied any opportunity to present his ineffective assistance claims fairly within the adversary process. In Georgia, ineffective assistance claims cannot be raised on direct appeal and must wait until the habeas trial court to be heard for the first time. If they are not raised and fully developed there, they likely can never be raised again. Mr. Gibson, confined to death row and borderline mentally retarded, was unable to formulate his claims, and therefore was denied the opportunity ever to raise them. He never had a lawyer investigate his case and marshal arguments on his behalf. If ever there was a "meaningless ritual" as condemned in *Douglas*, it was Exzavious Gibson standing alone before the Superior Court of Butts County, Georgia.

B. Due Process and Equal Protection Preclude States From Expediting Capital Cases Where Good-Faith Efforts To Secure Counsel Are Underway

Alternatively, the analysis can be focused even more narrowly on whether the Constitution permits a habeas trial court to expedite capital cases when good-faith efforts to locate volunteer counsel are underway. In this case, it was the Superior Court's decision to expedite the case that denied Mr. Gibson a full and fair opportunity, under the Due Process and Equal Protection principles discussed *supra*, to present his claims fairly within the adversary system.

Expediting cases where volunteer counsel has not, in good faith, been secured unjustifiably obstructs the

availability of professional representation, as condemned by the Court:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. *Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to the courts are invalid.*

Procunier v. Martinez, 416 U.S. 396, 419 (1974) (citing *Ex Parte Hull*, 312 U.S. 546 (1941)) (emphasis added).

By focussing on the constitutionality of expediting this case, the Court could avoid declaring a broad right to habeas counsel. At the same time, it could vindicate the principles of fair play and substantial justice that pervade its right to counsel cases.

C. The Determination of Whether Counsel Must Be Appointed Can Be Evaluated On A Case-By-Case Basis

Finally, the Court could elect a narrow remedy by leaving the decision of whether due process and equal protection call for the appointment of counsel to indigent death-row inmates to be answered in the first instance by the trial court. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court examined whether the Constitution requires the appointment of counsel in every parental status termination proceeding. The Court concluded that a broad rule covering every case was inappropriate, and decided instead to "leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance

by the trial court, subject, of course, to appellate review." *Id.* at 32. In other words, the decision of whether counsel was required in these proceedings is to be determined on a case-by-case basis.

The Court in *Lassiter* set forth a balancing test with which to determine whether, in a particular case, counsel must be appointed. On one side of the balance is the "presumption against the right to appointed counsel" where the individual's physical liberty is not at stake.[12] *Id.* at 27, 31. Three factors are weighed against this presumption: 1) the private interests at stake; 2) the Government's interest; and 3) the risk that the procedures used will lead to erroneous results. *Id.*

On the facts of this particular case, application of *Lassiter*'s balancing test leads to the conclusion that the habeas trial court denied Mr. Gibson due process of law when it refused to appoint counsel for him or stay the proceedings until volunteer counsel could be secured. First, the presumption against the right to appointed counsel in a state habeas case raising substantial ineffective assistance claims is particularly weak because the right to effective assistance of counsel is a fundamental trial right that addresses the integrity of the entire trial process and the fairness of the result.

Second, the three factors weigh heavily in favor of the appointment of counsel in this case. The private interests at stake are unquestionably high. Mr. Gibson's life is at issue and his limited mental capacity makes it impossible for him to formulate and present, for example, his claim that trial counsel provided ineffective assistance in the penalty phase

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[12] This presumption does not preclude the broader constitutional principles discussed *supra*. The right to effective assistance of counsel is, in a very real sense, a trial right. The loss of this right results in the unconstitutional deprivation of physical liberty. However, because trial counsel is unable as a practical matter to raise ineffective assistance claims, the resolution of this right is simply postponed until habeas review.

of his trial by failing to proffer, *inter alia*, evidence of his diminished mental capacity. Further, Mr. Gibson has a strong interest in ensuring that the trial proceedings were fundamentally fair. The State has a strong interest in seeing that its death penalty statute is enforced fairly against criminals, and perhaps has an interest in expediting the process for pecuniary and public policy reasons. In addition, the State shares Mr. Gibson's interest in ensuring the ability of the adversary system to produce just results. Finally, the risk that the procedures in this case will lead to an erroneous result are insupportably high. In general, constitutional errors are found in nearly half of all capital habeas cases. In this case a lawyer was necessary to investigate all avenues of his trial lawyer's effectiveness and to prepare and present complex psychological testimony by expert witnesses -- a task that Mr. Gibson, with his diminished mental capacity, was clearly incapable of performing. Moreover, it was unreasonable for the trial court to refuse a brief continuance during Mr. Gibson's good-faith search for a lawyer.

Accordingly, to the extent a weak presumption against the appointment of counsel existed in the habeas proceedings below, Mr. Gibson can demonstrate that it is overwhelmed by the three-factored analysis of the interests at stake.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari in this case.

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